Supreme Court, U.S.
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No. 99-1227

In The

Supreme Court of the United States

BRYON L. ROSQUIST, D.C., P.C., a Utah Corporation, and BRYON L. ROSQUIST, Individually,

Petitioners,

v.

MELANIE McCANN, NOELE NELSON, and LISA NIELSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the second degree felony of forcible sexual abuse, which is defined by Utah Code Ann. § 76-5-404 as, among other things, the nonconsensual touching of "the anus, buttoeks, or any part of the genitals of another, or . . . the breast of a female, . . . with intent to cause substantial emotional or bodily pain of any person or with the intent to arouse or gratify the sexual desire of any person," a "crime of violence" within the meaning of 18 U.S.C. § 16 and the Violence Against Women Act?

2. Should a categorical approach be used to determine whether a state criminal offense is a "crime of violence" within the meaning of 18 U.S.C. § 16 and the Violence Against Women Act?

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BRIEF IN OPPOSITION

Respondents Melanie McCann, Noele Nelson, and Lisa Nielson (hereinafter referred to as the "employees") submit this brief in opposition to the petition for writ of certiorari by Petitioners Bryon L. Rosquist, D.C., P.C., a Utah corporation, and Bryon L. Rosquist, an individual (hereinafter referred to collectively as "Rosquist").

STATEMENT OF THE CASE

A. Factual Background

The Tenth Circuit's opinion sets forth the factual background in this case:

> This appeal arises out of a civil action by plaintiffs-appellants Melanie McCann, Noele Nelson, and Lisa Nielson, against their former employer, chiropractor Bryon Rosquist. In their complaint, plaintiffs allege that during the course of their employment, Rosquist repeatedly fondled and rubbed their buttocks, breasts, and genital areas clothed and unclothed, without their consent and with the intent to gratify his sexual desire. The conduct occurred in the course of chiropractic examinations and ostensible adjustments that Rosquist allegedly required only of his female employees as a condition of their employment, as well as in other situations both in Rosquist's place of business and at workplace social events.

App. 21.

In July 1997, the employees filed suit in federal district court alleging violation of the Violence Against

Women Act ("VAWA") and, in particular, its civil liability provisions under the Civil Rights for Gender Motivated Violence Act ("GMVA"), 42 U.S.C. § 13981.[1] In addition, the employees asserted a number of state law claims against Rosquist. The VAWA provides a cause of action against any person who "commits a crime of violence motivated by gender." *See* 42 U.S.C. § 13981(c) (1999). "Crime of violence" is defined in relevant part as "an act or series of acts that would constitute a felony against the person . . . and that would come within the meaning of State or Federal offenses described in section 16 of Title 18." *See* 42 U.S.C. § 13981(d)(2)(A). The employees allege that Rosquist's conduct constituted the Utah offense of forcible sexual abuse,[2] and that this is a "crime of violence" under 18 U.S.C. § 16(b) because forcible sexual abuse "is a felony . . . that, by its nature, involves a substantial risk that physical force against the person or

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[1] Like Rosquist, the employees refer throughout this brief to the relevant civil suit provision as the "VAWA" unless otherwise indicated.

[2] Utah's forcible sexual abuse statute provides as follows:

> [a] person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

Utah Code Ann. § 76-5-404 (1999); App. 42.

property of another may be used in the course of committing the offense." *See* 18 U.S.C. § 16(b) (1999). App. 45.

B. The District Court's Decision

The district court dismissed the employees' suit for failure to state a claim upon which relief could be granted. The district court reasoned that although the employees had met the first element of the VAWA by alleging a felony against Rosquist under Utah law, *see* App. 5, the felony alleged, forcible sexual abuse, is not a "crime of violence" because "[w]hile the conduct alleged is offensive and repulsive, and according to U.C.A. § 76-5-404, a felony, it is not of the violent nature required to state a cause of action under [the VAWA]." *See* App. 17.

C. The Tenth Circuit's Opinion

The Tenth Circuit reversed the district court and remanded the case for proceedings consistent with its opinion. *See* App. 39. Contrary to the case-by-case approach used by the district court, the Tenth Circuit held that in assessing a "crime of violence" for purposes of the VAWA, a court should employ a categorical approach.

The Tenth Circuit held that its own decisions compelled the conclusion that the employees had alleged a "crime of violence." *See* App. 36. The Tenth Circuit relied upon *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993), which held that " 'a court must only look to the statutory definition, not the underlying circumstances of

the crime' to determine whether a given offense is 'by its nature a crime of violence' for purposes of 18 U.S.C. § 16." *See* App. 24 (quoting *Reyes-Castro*, 13 F.3d at 379). The district court erred by basing its analysis on the particular circumstances of the acts alleged in this case, rather than the statutory language. *See* App. 25.

The district court used a so-called "*Taylor* exception" to justify its analysis. *See* App. 25. In *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990), from which the "*Taylor* exception" is derived,

> the Supreme Court considered whether a conviction under the Missouri burglary statute constituted "burglary" for purposes of the sentence enhancement for violent felonies, specifically including burglary, imposed by 18 U.S.C. § 924(e). The Court rejected the notion that "burglary" under 18 U.S.C. § 924(e)(2)(B)(ii) refers to any offense labeled "burglary" by the relevant State, and concluded instead that Congress intended to establish, for purposes of § 924(e)(2)(B)(ii), a uniform federal definition of burglary as a violent felony. *See Taylor*, 495 U.S. at 590, 110 S. Ct. 2143. Under this approach, the Court adopted a "generic" definition of burglary as unlawful entry into a building or structure for purposes of the violent felony sentence enhancement, and considered whether the defendant's conviction, under a burglary statute that did not utilize this "generic" definition, constituted a conviction for "burglary" within the meaning of § 924(e)(2)(B)(ii). *Id.* at 598-99, 110 S. Ct. 2143.
>
> The Court in *Taylor* laid out a "categorical approach" for determining whether a state

> burglary statute satisfies the elements of federally-defined "generic burglary" for purposes of 18 U.S.C. § 924(e). *Id.* at 600, 110 S. Ct. 2143. Although normally this approach looks "only to the statutory definitions of the prior offenses, and not to the particular facts" underlying the convictions at issue, *id.*, nevertheless, the Court stated, "[t]his categorical approach . . . may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Id.* at 602, 110 S. Ct. 2143.

App. 25-26.

Evidently, the district court believed this case is one of the "narrow range of cases" where the court is allowed to go beyond the statutory definition. According to the district court,

> [t]he actions alleged do not constitute an offense that by its nature involved a substantial risk of the type of physical force required to state a cause of action under GMVA. Likewise, the time, place, manner, and other circumstances alleged are not such that the situation could escalate into one where there would be a substantial risk that physical force would be used. All of the acts alleged appear to have occurred at work or at social activities under circumstances that would have greatly discouraged any escalation of contact to the type of violent conduct required within the meaning of section 16(b) and GMVA.

App. 17.

The Tenth Circuit disagreed with the district court and held that the "*Taylor* exception" is "far narrower than the district court assumed, and does not envision the type of case-by-case inquiry that the district court applied." *See* App. 27. The Tenth Circuit noted that in *United States v. Permenter*, 969 F.2d 911, 913-14 (10th Cir. 1992), it had "rejected the contention that the *Taylor* exception should extend beyond enumerated offenses to the 'otherwise' clause of 18 U.S.C. § 924(e)(2)(B)(ii), which provides for defining an offense as a qualifying crime of violence in general terms – as does [18] U.S.C. § 16." *See* App. 27 (footnote omitted).

> The "*Taylor* exception" is therefore restricted to cases in which a court looks beyond the simple fact of a conviction to determine whether the offense meets the elements of certain specific offenses enumerated in § 924(e)(2)(B)(ii). *See Permenter*, 969 F.2d at 913. The exception does not apply to the "otherwise" clause of § 924(e)(2)(B)(ii), which defines "violent felony" as a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Likewise, it does not apply by analogy to 18 U.S.C. § 16, the statutory provision defining crimes of violence. Rather, § 16 is closely analogous to the "otherwise" clause of § 924(e)(2)(B)(ii), which defines a violent felony in general terms. Therefore, *Permenter* prohibits application of the "*Taylor* exception," or any equivalent exception to the categorical approach, when examining an offense to determine whether it qualifies as a "crime of violence" under 18 U.S.C. § 16.

App. 28 (footnote omitted).

After determining the proper analysis that should be used, the Tenth Circuit asked whether its decision in *Reyes-Castro* compelled a conclusion that the Utah offense of forcible sexual abuse is a "crime of violence." *See* App. 30. The Tenth Circuit in *Reyes-Castro* held that the Utah offense of attempted sexual abuse of a child is a "crime of violence" under 18 U.S.C. § 16(b).[3] *See* App. 24-25. Because the elements of forcible sexual abuse and sexual abuse of a child are essentially identical under Utah law, the Tenth Circuit concluded it was bound to follow *Reyes-Castro*. *See* App. 24-25, 31, 36. Compare Utah Code Ann. § 76-5-404(1), which is reproduced in footnote 2, with Utah Code Ann. § 76-5-404.1(1), which is reproduced in footnote 3. The Tenth Circuit stated:

> Although children's lesser physical stature and general vulnerability to violence and sexual exploitation by adults may increase the risk that physical force be exerted to ensure compliance in situations of child sexual abuse, this presumption by no means forecloses the potential

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[3] Utah's sexual abuse of a child statute provides as follows:

> A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

Utah Code Ann. § 76-5-404.1(1) (1999); App. 42-43.

560 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court").

C. The Tenth Circuit Properly Applied Well-Established Precedent Interpreting "Crime of Violence" Under 18 U.S.C. § 16 And Similar Acts That Were Decided Before Congress Passed The VAWA.

Rosquist sounds the alarm and suggests that the Tenth Circuit's decision involves an "important question with substantial implications for the workload of the federal courts." *See* Pet. for Cert., at 9. Rosquist argues that if the Tenth Circuit's interpretation of the VAWA is left standing, "then a vast array of issues traditionally litigated in state courts will be deflected to federal court dockets." *Id.* Rosquist's argument is a smoke-screen designed to divert the attention of the Court from the dispositive issue, *i.e.*, whether the Tenth Circuit properly applied its precedent to decide that Utah's forcible sexual abuse statute states a "crime of violence" for purposes of the VAWA. The Tenth Circuit's decision properly fulfills congressional intent, and is based soundly on its own precedent interpreting "crime of violence" under 18 U.S.C. § 16 and similar acts that were decided before Congress passed the VAWA.

Relying on *United States v. Permenter* and *United States v. Reyes-Castro*, the Tenth Circuit concluded that it was required to look only to the statutory definition of the Utah offense of forcible sexual abuse to determine whether it is a "crime of violence" for purposes of the

VAWA, and that the district court erred in using the "*Taylor* exception." *See* App. 25-28. The Tenth Circuit then applied *Reyes-Castro* to conclude that the Utah offense of forcible sexual abuse is a "crime of violence," because *Reyes-Castro* found that the Utah offense of attempted sexual abuse of a child is a "crime of violence" and the two offenses are identical for all relevant purposes. *See* App. 30-36.

The Tenth Circuit's decision was clearly driven by its prior decisions and cannot be an expansion of federal court jurisdiction beyond what Congress intended. As the Tenth Circuit recognized, Congress explicitly incorporated the definition of "crime of violence" from 18 U.S.C. § 16 into the VAWA.[4] Certainly, Congress knew that 18 U.S.C. § 16 had been the subject of judicial interpretation before it incorporated section 16 into and passed the VAWA. "Where Congress uses the same form of statutory language in different statutes having the same general purpose, courts presume that Congress intended the same interpretation to apply in both instances." *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1568 (Fed. Cir. 1995). Congress did more than use similar language in the VAWA as found in 18 U.S.C. § 16, it expressly incorporated 18 U.S.C. § 16 into the VAWA.

Congress is, therefore, presumed to have intended that prior decisions interpreting the "crime of violence"

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[4] "Crime of violence" is defined in relevant part as "an act or series of acts that would constitute a felony against the person . . . and that would come within the meaning of State or Federal offenses *described in section 16 of Title 18*." *See* 42 U.S.C. § 13981(d)(2)(A) (emphasis added). App. 46-47.

> that the risk of such force against adults is nevertheless substantial within the meaning of 18 U.S.C. § 16. In *Reyes-Castro*, we focused on the relationship between lack of consent and the substantial risk of the application of physical force. We conclude today that such relationship is significant regardless of the age of the victim. . . .
>
> Moreover, we note that the risk of physical force in a completed act or completed acts of forcible sexual abuse is arguably even greater than the risk at issue in *Reyes-Castro*, which involved attempted sexual abuse. *See Reyes-Castro*, 13 F.3d at 378.

App. 32-34 (footnote omitted).

Finally, the Tenth Circuit refused to consider the constitutionality of the GMVA because Rosquist did not raise the issue in the district court and the district court did not rule on it. *See* App. 37. The court rejected Rosquist's invitation to adopt a narrow interpretation of the term "crime of violence" in 18 U.S.C. § 16 for purposes of the VAWA to supposedly avoid constitutional issues. The Tenth Circuit wrote:

> Section 16 exists independently of the VAWA, and we cannot disregard Congress's clear legislative intent to incorporate its definition of crimes of violence into the GMVA. It is simply not permissible for us to create, contrary to clear legislative intent, a special narrower construction of 18 U.S.C. § 16 for purposes only of the GMVA, in an effort to avoid a hypothetical constitutional challenge. Moreover, the relationship between the GMVA's incorporation of the definition of crimes of violence and Congress's

> authority to enact the GMVA under the Commerce Clause and the Fourteenth Amendment is exceptionally attenuated. Thus we are neither persuaded that constitutional concerns require insertion of a narrowing construction into the GMVA's incorporation of 18 U.S.C. § 16, nor that such concerns are sufficiently intertwined with the issue of the construction of the GMVA and § 16 to require resolution today.

App. 38.

REASONS FOR DENYING CERTIORARI

This is not the kind of case justifying a review by the United States Supreme Court. The issue presented to this Court is one of simple statutory construction, and whether the Tenth Circuit properly employed a categorical approach to find that Utah's forcible sexual abuse statute states a "crime of violence" under 18 U.S.C. § 16 and the VAWA. The decision of the Tenth Circuit is firmly supported by governing Tenth Circuit precedent and fulfills the congressional intent of the VAWA.

Questions like this, which simply examine the correctness of a lower court's decision, are not the kind reserved for Supreme Court review, especially in light of the interlocutory nature of the Tenth Circuit's decision and the lack of any conflict between the Tenth Circuit's decision and the decisions of other circuit courts. Any perceived conflict among the circuits suggested by Rosquist is fabricated and is not supported by an accurate reading of the case law. The petition should be denied.

ARGUMENT

A. The Supreme Court Should Not Entertain Rosquist's Request To Simply Correct Perceived Errors in the Tenth Circuit's Decision.

Rosquist argues that the Tenth Circuit's opinion "reads the civil liability provision in VAWA far more broadly than anyone debating the Act had ever suggested." *See* Pet. for Cert., at 10. In other words, Rosquist believes that the Tenth Circuit incorrectly interpreted the VAWA. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." Robert L. Stern et al., *Supreme Court Practice*, § 4.17, at 193 (7th ed. 1993). If it were, the Supreme Court would be transformed into another tribunal of errors and appeals, "contrary to its constitutional mission and beyond the capacity of any single body of judges." *Id. See also* Remarks of Justice William Brennan at the Third Circuit Judicial Conference, September 9, 1982, at 4 ("[E]ver since the Judges Bill of 1925 the Supreme Court . . . has not been expected to take on the function of primarily – or even largely – correcting errors committed by other courts."). Indeed, certiorari jurisdiction is to be "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S. Ct. 269, 271, 60 L.Ed. 629 (1916). *See also* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). A case such as this one, which concerns the legal interpretation of a federal statute by one federal court, does not involve issues of peculiar gravity, nor does it present a question needing resolution

to secure uniformity of decision. In sum, this case and the questions presented do not warrant this Court's review.

B. The Interlocutory Nature of the Tenth Circuit's Decision Is Sufficient Ground Alone For Denying Rosquist's Request for Review.

The Supreme Court will not exercise its jurisdiction to review a judgment of a court of appeals that is interlocutory in nature, except in extraordinary cases. *See American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384, 13 S. Ct. 758, 763, 37 L.Ed. 486 (1893); *Hamilton-Brown Shoe*, 240 U.S. at 258, 36 S. Ct. at 271. This case was disposed of at the district court level when that court dismissed the employees' complaint for failure to state a claim upon which relief can be granted. *See* App. 18. The Tenth Circuit reversed that decision and remanded the case back to the district court for proceedings consistent with its opinion. *See* App. 39. The case is still on-going and no final judgment has been rendered. The lack of finality in the judgment below may "of itself alone furnish sufficient ground for the denial of [an] application [for certiorari]." *See Hamilton-Brown Shoe*, 240 U.S. at 258, 36 S. Ct. at 271. *See also Virginia Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432, 124 L.Ed.2d 651 (1993) (Scalia, J., concurring) (stating where court of appeals vacates judgment entered in favor of petitioners and remands case to district court, Supreme Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostoock R.R. Co.*, 389 U.S. 327, 328, 88 S. Ct. 437, 438, 19 L.Ed.2d

the conflicts and confusions that the decision created." *See* Pet. for Cert., at 10. While it is true that the Supreme Court may grant a writ of certiorari where the decision of a federal court of appeals is in direct conflict with a decision of another court of appeals on the same matter of federal law, *see* Sup. Ct. R. 10(a), there is no such conflict between circuits in this case.

In primary support of his "conflict" argument, Rosquist cites *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1997), a case that was *not* decided under the VAWA or its civil liability provision. In *Shannon*, the Seventh Circuit held that a criminal information charging the defendant with having sexual intercourse with a 13-year old girl stated a "crime of violence" for purposes of the Sentencing Guidelines. *See id.* at 389. As part of his discussion, but not necessary for the decision, Judge Posner rejected the argument that "any felonious sexual act with a minor" is a crime of violence for purposes of the Sentencing Guidelines. *Id.* at 385-86. Because he ultimately concluded that the crime alleged was a "crime of violence," the rejection of this argument is *dicta*. As *dicta*, it cannot form the basis for a conflict in circuit decisions sufficient to justify this Court's discretionary review. *See* Stern et al., *Supreme Court Practice* § 4.3, at 167 (stating that Supreme Court will generally exercise its jurisdiction to resolve a real or intolerable conflict on the same matter of law or fact, "not merely an inconsistency in *dicta* or in the general principles utilized" (emphasis added)).

Shannon is also different from this case because it was decided under the Sentencing Guidelines, not 18 U.S.C. § 16. The job for the court in *Shannon* when applying the Sentencing Guidelines was to determine whether sexual

intercourse with a 13-year old created a " 'serious potential risk of physical *injury*.' " *See id.* 110 F.3d at 386 (citation omitted) (emphasis added). In contrast, the task for the Tenth Circuit in this case was to determine whether the Utah offense of forcible sexual abuse "is a felony . . . that, by its nature, involves a substantial risk that physical *force against the person* or property of another may be used in the course of committing the offense." *See* 18 U.S.C. § 16(b) (emphasis added). The different language of these definitions warrants different analyses. Therefore, comparing *Shannon* to this case and arguing that a conflict exists between circuits, worthy of this Court's resolution, is simply unjustified. *See* Stern et al., *Supreme Court Practice* § 4.3, at 167 (to have a conflict between circuits worthy of supreme court review, the conflict must exist "on the same matter of law or fact").

Rosquist also cites *Doe v. Hartz*, 134 F.3d 1339 (8th Cir. 1998); *Wilson v. Diocese of New York of the Episcopal Church*, 1998 WL 82921 (S.D.N.Y. 1998); *Henderson v. Heartland Press, Inc.*, 65 F. Supp. 2d 991 (N.D. Iowa 1999); and *Palazzolo v. Ruggiano*, 993 F. Supp. 45 (D.R.I. 1998), in support of his "conflict" argument. None of these cases supports the Supreme Court's exercise of its jurisdiction.

In *Hartz*, a female parishioner sued her priest alleging violation of the VAWA. The plaintiff alleged that the priest had sexually assaulted her while she sang during an evening mass and while she was talking with other parishioners. The district court denied a motion to dismiss the complaint, and the Eighth Circuit reversed. The Eighth Circuit concluded, over Judge Fagg's strong dissent, that the plaintiff had not alleged a "crime of violence" because the allegations in the complaint did not

definition found in 18 U.S.C. § 16 also apply to defining crimes of violence for purposes of the VAWA. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813, 109 S. Ct. 1500, 1506, 103 L.Ed.2d 891 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts."); *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the knowledge of the interpretation that courts have given to an existing statute."). By applying such prior case law, the Tenth Circuit fulfilled Congress's expectations.

Rosquist suggests that the Tenth Circuit's opinion fails to recognize Congress's "carefully-crafted limitation" as to what constitutes a "crime of violence." *See* Pet. for Cert., at 9. This begs the question. Rosquist cites the final report on the VAWA that the "civil rights provision is *strictly limited* to felonious crimes of violence.' " *Id.* (quoting S. Rep. No. 103-138 at 52) (emphasis in Pet. for Cert.). The Tenth Circuit found that under its own authority, forcible sexual abuse as alleged by the employees is a felonious crime of violence, thereby coming within Congress's mandate. *See* App. 36.

In his review of VAWA's legislative history, Rosquist fails to take into account the fact that Congress recognized and acknowledged that an "assault" would give rise to civil liability under the act, so long as the assault was motivated by gender. *See* S. Rep. No. 103-138, at 51 (1993) ("For a cause of action to arise under [the civil liability provision], a plaintiff must prove that the crime

of violence – whether an *assault*, kidnapping or a rape – was motivated by gender." (emphasis added)). While he cites to this Senate Report, Rosquist makes no arguments to distinguish an "assault" from the acts complained of in the employees' complaint. Certainly, forcible sexual abuse is a form of assault.

Rosquist also argues that the Tenth Circuit's decision will result in any person who has been subjected to non-consensual sexual touching being able to file a federal lawsuit. *See* Pet. for Cert., at 10. This is not true. Only a non-consensual sexual touching that also qualifies as a "crime of violence motivated by gender" for purposes of the VAWA will allow the victim to pursue a lawsuit in federal court, just as Congress intended. *See* 42 U.S.C. § 13981(c). This, of course, requires a categorical analysis of the particular crime at issue.

The Tenth Circuit's decision thus fulfills congressional intent rather than subverts it. It does nothing more than apply established decisions of the Tenth Circuit to find that the Utah offense of forcible sexual abuse is a "crime of violence" for purposes of the VAWA. That decision is clearly correct, and review by the Supreme Court is not justified.

D. Any Perception That The Tenth Circuit's Decision Created or Aggravated Conflict Among The Circuits is Fabricated.

Rosquist argues that the Tenth Circuit's decision "conflicts with other decisions of federal courts that have construed the phrase 'crime of violence' in VAWA," and that review by the Supreme Court is necessary "to resolve

adequately plead the predicate Iowa offense upon which the plaintiff relied and because the allegations did not amount to a felony under either Iowa state law or federal law. *See Hartz*, 134 F.3d at 1342. Whereas the plaintiff's allegations in *Hartz* amounted only to an aggravated misdemeanor under state law, it has never been disputed in this case that the employees' allegations, if true, would constitute forcible sexual abuse, a felony under Utah law.

Similarly in *Wilson*, an unpublished decision, the court concluded that the plaintiff's allegations did not constitute a felony under Connecticut or New York state law. *Id.* at *12. Having alleged no felony conduct, the plaintiff's VAWA claims necessarily failed.

In *Henderson*, the plaintiff had based her VAWA claim on the predicate offense of felony kidnaping under Iowa state law. Like *Hartz* and *Wilson*, however, the court found that the plaintiff's allegations failed to state a claim for felony kidnaping.

The only case cited by Rosquist that is even arguably close to being in conflict with the Tenth Circuit's decision in this case is the Rhode Island federal district court's opinion in *Palazzolo*. In *Palazzolo*, a psychiatrist was sued under VAWA for allegedly engaging in unlawful sexual contact with the plaintiff. Using a case-by-case approach to analyze the facts, and not the categorical approach the Tenth Circuit ruled in this case is required to determine if a crime alleged is a "crime of violence," the district court in *Palazzolo* held that the predicate offense relied upon in that case was not a "crime of violence." *See Palazzolo*, 993 F. Supp. at 47-48.

While *Palazzolo* appears to be in conflict with the Tenth Circuit's decision in this case, this conflict is not the kind that concerns or should be resolved by the Supreme Court on a grant of certiorari because it is merely a conflict between a circuit court decision and a district court decision. *See* Stern et al., *Supreme Court Practice* § 4.8, at 178 ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit."); Sup. Ct. R. 10(a) (character of reasons for considering a grant of certiorari, do not include a conflict between a federal court of appeals decision and a decision of a federal district court).

Finally, Rosquist argues that the Tenth Circuit's decision conflicts with other federal enactments, including the federal criminal code, to the extent it now allows a criminal in the Tenth Circuit to be subjected to enhanced criminal penalties for touching another person without his or her consent. *See* Pet. for Cert., at 15. Rosquist fails to point out to the Court that the official commentary to the sentencing guidelines already identifies "forcible sex offenses" as crimes of violence. *See* U.S. Sentencing Guidelines Manual § 4B1.2 commentary (1998) (stating that " '[c]rime of violence' includes murder, manslaughter, kidnapping, aggravated assault, *forcible sex offenses*, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling"). Thus, just how the Tenth Circuit's decision conflicts with the already-existing criminal law and sentencing guidelines is not adequately explained by Rosquist.

E. The Tenth Circuit's Decision Will Not Result In An Uneven Application of VAWA Among the Different States.

Rosquist's final reason for invoking Supreme Court jurisdiction is that the Tenth Circuit's decision creates a "disparate application" of VAWA among the states. Rosquist's argument is based primarily on this Court's statement in *Taylor v. United States* that "absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law." *Taylor*, 495 U.S. at 591, 110 S. Ct. at 2154, 109 L.Ed.2d 607. Rosquist's argument is at best speculative, and in any event is a red herring.

The plain language of the VAWA and the Tenth Circuit's own precedent supports its decision. Relying on *United States v. Permenter* and *United States v. Reyes-Castro*, the Tenth Circuit concluded that it was required to look only to the statutory definition of the Utah offense of forcible sexual abuse to determine whether it is a "crime of violence" for purposes of the VAWA. *See* App. 24. Under the VAWA, a "crime of violence" is "an act or series of acts that would *constitute a felony against the person* . . . and that would come within the meaning of *State or Federal offenses* described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction. . . . " *See* 42 U.S.C. § 13981(d)(2)(A) (emphasis added). Section 16 of Title 18 defines "crime of violence" as including "any . . . offense that is a *felony* and that, *by its nature*, involves a *substantial risk* that physical force against the person or property of another *may be used* in the course of committing the offense." 18 U.S.C. § 16(b) (emphasis added). In using

such terms and phrases as "nature" and "may be used," Congress has clearly indicated that a categorical approach is to be applied in determining whether a particular offense is a "crime of violence." Like it or not, this is the way the VAWA reads, and the Tenth Circuit's decision is consistent with the statute's plain language.

That Congress intended an application of the VAWA that is consistent with the Tenth Circuit's decision is further supported by *Hartz*, *Wilson*, and *Henderson*, the very decisions relied on by Rosquist for his "conflict" argument. As discussed earlier, these decisions all involved a review of whether the factual allegations in the plaintiffs' complaints fit within the respective predicate offenses relied on by the plaintiffs for their VAWA claims. In all three decisions, the courts held that the plaintiffs' complaints failed to allege facts constituting the specific state predicate offenses at issue. *See Hartz*, 134 F.3d at 1342 ("The alleged sexual conduct constitutes a felony under neither Iowa nor federal law."); *Wilson*, 1998 WL 82921 at *12 ("[T]he alleged conduct cannot be considered felonious under any relevant [Connecticut or New York] state law."); *Henderson*, 65 F. Supp. 2d at 1001-02 (defendant's conduct was not felonious under Iowa state law and therefore plaintiff failed to state an adequate VAWA claim).

As supported by these decisions, as well as by the plain language of the statute, it was necessary for the Tenth Circuit to analyze Rosquist's conduct under Utah-specific state law, *regardless of how the same facts would be viewed in another state*, and to analyze the state law against the definition of "crime of violence" found in the VAWA. Had Congress wanted the courts to disregard how each

matter under advisement at the conclusion of oral argument and now issues this memorandum decision.

FACTUAL BACKGROUND

Plaintiffs were Defendants' employees. Defendant Dr. Rosquist is a chiropractor. Plaintiffs have accused defendant Rosquist of inappropriate sexual remarks and touchings. They have alleged state law causes of action and have included one federal claim under the Violence Against Women Act ("VAWA") upon which this Court's jurisdiction depends. Defendants have moved to dismiss the VAWA claim, and if the Court does so, the pendant state law claims for lack of jurisdiction. Essentially, the Defendants claim that the alleged acts do not constitute a "crime of violence" and that, as alleged, they were not "motivated by gender." Plaintiffs assert that the felony alleged, U.C.A. § 76-5-404, titled "Forcible sexual abuse", is a "crime of violence" by categorical definition and therefore any allegation sufficient to state a cause of action under section 76-5-404 is a crime of violence for VAWA purposes. Plaintiffs suggest that the Court must make this determination on the basis of how the alleged crime is defined by law without regard to the specific conduct of the defendants.

STANDARD OF REVIEW

For purposes of a motion to dismiss, the allegations of the complaint are presumed to be true and are construed in the light most favorable to the plaintiffs. *Yoder v. Honeywell, Inc.*, 104 F.3d 1215, 1224 (10th Cir.1997) (well-

pleaded allegations are accepted as true and construed in a light most favorable to plaintiff) (quoting *Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir.1996)); *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991) (citing *Curtis Ambulance of Fla., Inc. v. Board of County Comm'rs*, 811 F.2d 1371, 1374 (10th Cir.1987)) (allegations of complaint are presumed to be true). The complaint will only be dismissed if it appears that the plaintiffs cannot prove facts entitling them to relief. *Miller*, 948 F.2d at 1565.

INTRODUCTION TO VAWA/GMVA

In 1994, Congress passed the Civil Rights for Gender Motivated Violence Act (GMVA) as a subtitle to the Violence Against Women Act (VAWA). The GMVA subtitle was intended as the civil rights arm of VAWA.[1] It provides a civil cause of action for relief from crimes of violence motivated by gender. 42 U.S.C.A. § 13981 (1995) (the act also allows attorneys fees pursuant to § 1988, and recovery of compensatory and punitive damages, and injunctive and declaratory relief). The Act was intended as a supplement to, rather than a replacement for, existing state and federal remedies. S.Rep. No. 103-138, at 51 (1993) (no intended to supplant state tort law); S.Rep. No. 103-138, at 53 (not intended to undermine existing civil rights protections under title VII); *see also Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949, 971 (4th Cir.1997) ("VAWA acts to supplement, rather than supplant, state criminal, civil, and family law

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[1] The short title of that portion of the act is the "Civil Rights Remedies for Gender Motivated Violence Act." P.L. 103-322, Title IV, subtitle C; 108 Stat.1941.

state defines a particular felony, it would have stated so in the VAWA, and it would have extracted all references to state law. Because Congress did not do so, the Tenth Circuit's decision was correct and is not in need of review by the Supreme Court.

CONCLUSION

The Court should deny the petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

998 F.Supp. 1246
(Cite as: 998 F.Supp. 1246)

Melanie McCANN, Noele Nelson, and Lisa Nielson, Plaintiffs,

v.

BRYON L. ROSQUIST, D.C., P.C., a Utah corporation, and Bryon L. Rosquist, individually, Defendants.

No. 2:97-CV-0535-S.

United States District Court,
D. Utah,
Central Division.

March 19, 1998.

Anthony B. Quinn, Susan J. Mueller, Larry S. Jenkins, Wood Crapo, Salt Lake City, UT, for Plaintiffs.

Brent O. Hatch, Heather A. McDougald, Johnson & Hatch, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION

SAM, Chief Judge.

INTRODUCTION

This matter is before the Court on Defendants' Motion to Dismiss. Counsel were present in court on January 7, 1998 for oral argument. Mary Anne Wood, Larry S. Jenkins and Susan J. Mueller appeared on behalf of Plaintiffs. Defendants were represented by Brent O. Hatch and Heather A. McDougald. The Court took the

controlling gender violence."); *Palazzolo v. Ruggiano*, 993 F.Supp. 45, 46-47 (D.R.I.1998) ("The cause of action created by VAWA supplements and does not supplant any claims that a plaintiff may have under applicable state law.").

A number of courts have discussed the constitutionality of the civil rights provisions of VAWA. The majority of courts that have dealt with the issue have concluded that VAWA is a constitutional exercise of the powers vested in Congress through the Commerce Clause – Article I, Section 8 of the U.S. Constitution. *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949 (4th Cir.1997) (*but see* dissent by Justice Luttig); *Mattison v. Click Corp. of America, Inc.*, 1998 WL 32597 (E.D.Pa., 1998) (No. Civ.A.97-CV-2736); *Crisonino v. New York City Housing Authority*, 985 F.Supp. 385 (S.D.N.Y.1997); *Anisimov v. Lake*, 982 F.Supp. 531 (N.D.Ill.1997); *Seaton v. Seaton*, 971 F.Supp. 1188 (E.D.Tenn.1997); *Doe v. Doe*, 929 F.Supp. 608 (D.Conn.1996). The parties in the present case have not raised this issue. Furthermore, as a matter of judicial restraint the Court must first analyze the nonconstitutional challenges to the statute's applicability in the instant case. *Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985).

In order to state a cause of action under section 13981 (hereinafter "GMVA"), a party must allege the commission of a "crime of violence motivated by gender." A defendant has committed a "crime of violence" within the meaning of GMVA if he/she satisfies the following requirements:

> (1) The "act or series of acts [must] constitute a felony against the person"; and
>
> (2) The "act or series of acts" must be a State or Federal offense within the meaning of title 18, section 16 of the United States Code which requires that the offense either:
>
> (a) have "as an element the use, attempted use, or threatened use of physical force against the person or property of another," or
>
> (b) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

42 U.S.C. § 13981(d)(2)(A); 18 U.S.C. § 16. Furthermore, the "act or series of acts" are "motivated by gender" when they are "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender. . . . " 42 U.S.C.A. § 13981(d)(1).

Dr. Rosquist is accused of having committed acts which constitute forcible sexual abuse – a crime that is a felony under Utah law. U.C.A. § 76-5-404 (1995). Therefore, Plaintiffs have established the first prong of the GMVA requirements. Plaintiffs have conceded that the alleged offense does not include as an element the use, attempted use, or threatened use of physical force and, therefore, does not satisfy subsection (a) of section 16. (Pls.' Mem. Opp. Mot. to Dis., at 3.) Accordingly, the issue before the Court is whether the Plaintiffs have stated a claim based on part (b) of the second prong of the GMVA requirements – that the "act or series of acts" constitute

an offense that, by its nature involves a substantial risk that force may be used within the meaning of section 16(b).

Currently there are only a handful of cases that have applied VAWA. Many of those cases have not contained any relevant discussion of GMVA. Of those that have involved GMVA few have involved any helpful analysis of GMVA's definition of "crime of violence" in a context involving either the type of conduct or the type of predicate crime alleged in this case. In fact, this Court is aware of only eleven federal cases citing the Violence Against Women Act in the context of GMVA. Included in those eleven cases are opinions by the Fourth and Eighth Circuits – *Doe v. Hartz*, 134 F.3d 1339 (8th Cir.1998) and *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 949 (4th Cir.1997). The remainder are district court opinions. Eight opinions have allowed a GMVA action to proceed.[2] The allegations in those cases have been rape, varying forms of criminal assault and battery, and violent physical and mental abuse. Three opinions dismissed the GMVA claims for failure to adequately allege a predicate crime or because the predicate crime

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[2] *Brzonkala*, 132 F.3d 949 (rape); *Mattison v. Click Corp. of America, Inc.*, 1998 WL 32597 (E.D.Pa., Jan. 27, 1998) (sexual assault, battering); *Wesley v. Don Stein Buick, Inc.*, 985 F.Supp. 1288, 1997 WL 748724 (D.Kan., Nov.20, 1997) (aggravated assault); *Crisonino v. New York City Housing Authority*, 985 F.Supp. 385 (S.D.N.Y.1997) (second degree assault); *Anisimov v. Lake*, 982 F.Supp. 531 (N.D.Ill.1997) (rape); *Seaton v. Seaton*, 971 F.Supp. 1188 (E.D.Tenn.1997) (assault and battery); *Newton v. Coca-Cola Bottling Co. Consol.*, 958 F.Supp. 248 (W.D.N.C.1997) (assault); *Doe v. Doe*, 929 F.Supp. 608 (D.Conn.1996) (assault and battery).

was not a crime of violence. *Hartz*, 134 F.3d 1339 (8th Cir.1998) (Sexual exploitation by a counselor or therapist – failure to allege predicate crime and predicate crime, as alleged, not a crime of violence); *Palazzolo*, 993 F.Supp. 45 (Second degree sexual assault – of two part statute, plaintiff failed to allege elements of one part and the second part did not constitute a crime of violence); *Wilson v. Diocese of New York of Episcopal Church*, 1998 WL 82921 (S.D.N.Y., Feb.26, 1998) (Third degree sexual assault – facts as alleged were insufficient to state a claim under any state statute that could be considered a crime of violence). The allegations in the three cases dismissing the GMVA claim involved nonconsensual touching and kissing – actions which sharply contrast with the allegations in the previously mentioned eight cases where the VAWA claims were allowed to proceed.

With this backdrop of precedent the Court will proceed to determine the intended scope of GMVA.

SCOPE OF GMVA

Whether Plaintiffs allege a "crime of violence" is not readily determinable by looking only at the statutory language of GMVA or the definition of "crime of violence" in section 16. Hence, an appeal to the legislative history of GMVA and VAWA is warranted in order to enlighten our application of section 16 subsection (b) in the context of GMVA. *See, Barnhill v. Johnson*, 503 U.S. 393, 401, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992) (appropriate to appeal to legislative history in cases of statutory ambiguity).

VAWA was first introduced in 1990 "in response to the escalating problem of violence against women." S. Rep. 103-138 at 37. To demonstrate the need for the legislation, the Senate reported the following:

> Women in America suffer all the crimes that plague the Nation – muggings, car thefts, and burglaries to name a few. But there are also some crimes, including rape and family violence, that disproportionately burden women- . . . . Both our resolve and our laws must change if women are to lead free and equal lives.

Id.

The report continues by stating statistics representing the nature of violence committed against women:

> In 1991 at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults – including aggravated assaults, rapes, and murders – were committed against women in their homes that year. . . .
>
> Every week, during 1991, more than 2,000 women were raped, and more than 90 were murdered. . . . Women are six times more likely than men to be the victim of a violent crime committed by an intimate;
>
> . . . .
>
> Violence is the leading cause of injuries to women ages 15 to 44,. . . .

S. Rep. 103-138 at 37-38.

The Senate report discusses the problem of violence in terms such as rape, sexual assault, murder, and domestic violence. The report discusses battered women's shelters and situations where women are subject to hitting, attacking, and otherwise fearing for their safety. In the context of providing a civil rights remedy, the Senate stated that "the act provides, for the first time, a Federal civil rights remedy aimed at violent gender-based crimes. It is time for attacks motivated by gender bias [sic] to be considered as serious as crimes motivated by religious, racial, or political bias." *Id.* at 38. While placing special emphasis on domestic violence, VAWA was also intended to respond to needs outside the "family violence arena" where "victims of rape are often unable to find either justice or protection in the criminal justice system." *Id.* at 42. The report states that "[f]or a cause of action to arise under title III, a plaintiff must prove that the crime of violence – whether an assault, a kidnaping, or a rape – was motivated by gender." *Id.* at 51. Finally, in the section by section analysis of the Act, the committee stated that "[t]he conduct covered under [the civil rights] section includes crimes of violence, including felony rape, sexual assault, kidnaping, and any other felonies against the person (. . .) committed because of or on the basis of gender, and motivated, at least in part, by an animus toward the victim's gender." *Id.* at 64.

Based on the foregoing, it is clear that VAWA was intended to proscribe conduct that contributed to the national dilemma of violence perpetrated against women on account of their gender. While there may be a variety of abuses suffered by women on account of their gender, the focus of VAWA and GMVA is to provide a remedy for

victims of violent acts – i.e. rape, assault, kidnaping. Therefore, the Court will now determine whether the Plaintiffs' cause of action alleges the commission of an offense that, by its nature, is consistent with the types of offenses intended to be remedied by VAWA.

CATEGORICAL APPROACH AND GMVA

Determining what types of offenses constitute a "crime of violence" is not a novelty in the federal courts. On the contrary, federal courts have dealt with the term in one context or another for years. The term "crime of violence" is used in determining sentence enhancement for Career Offenders (USSG §§ 4B1.1 to .2), Armed Career Criminals (USSG § 4B1.4; 18 U.S.C.A. § 924(c)(3)), or Unlawfully Entering or Remaining in the U.S. having been deported after a conviction of an "aggravated felony." (USSG § 2L1.2.(b)(1)(A); 8 U.S.C.A. § 1101(a)(43)) (these two statutes – 2L1.2 and 1101(a)(43) – use 18 U.S.C.A. § 16 as a part of the definition, like the GMVA). The term is also used in the Bail Reform Act (18 U.S.C.A. § 3156(a)(4)(B)) (the definition is very similar to that contained in section 16 but it does not refer to section 16). The Sentencing Guidelines define "crime of violence" at section 4B1.2. That definition is almost identical to the definition of "violent felony" contained in 18 U.S.C.A. § 924(e)(2)(B) (they differ in that the definition in the Sentencing Guidelines requires "burglary of a dwelling" in lieu of "burglary").

In determining whether a particular offense is a "crime of violence" within the meaning of section 16, courts have begun to apply the, so called, "categorical

approach." *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir.1993). The roots of the "categorical approach" are found in the Supreme Court case of *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In *Taylor*, the Court concluded that in order to determine whether a "burglary" was a "violent felony" within the meaning of 18 U.S.C.A. § 924(e), the court should use a uniform categorical approach rather than "depend on the definition adopted by the State of conviction." *Id.* at 590. The purpose being to create certain categories of crimes that would be evaluated the same regardless of the state of origin. *Id.* at 591-92. The Court explained that a categorical approach required "the trial court to look only to the fact of conviction and the statutory definition of the prior offense."[3] *Id.* at 602.

However, the *Taylor* Court admitted the necessity of looking "beyond the mere fact of conviction in a narrow range of cases" in which the statutory definition of the crime encompassed both conduct that fit clearly within the federally defined category and conduct that fell outside the federally defined category.[4] Without the

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[3] While the decision in *Taylor* has been used as authority for the general interpretation of "crime of violence," it should be noted that its holding is limited to defining burglary as a "violent felony" for purposes of sentence enhancement pursuant to 18 U.S.C. § 924(e). However, to the extent that the holding supports a policy of federal uniformity, it is as applicable to GMVA as it is to other federal statutes.

[4] The example given in *Taylor* to illustrate the exception was a state statute that included both the entry of an automobile and the entry of a building as burglary. Under the Court's definition of the category of "generic burglary," a person would need to be charged with entry of a building to receive the

exception, as articulated in *Taylor*, the policy of federal uniformity would be undermined. One of two problems could occur: (1) conduct that clearly fit within the categorical definition would go unpunished if the state statute that proscribed the conduct was too broad to fit within the federally defined category, or (2) an overly broad statute could be labeled as a per se "crime of violence," thereby creating the risk that conduct falling outside the categorical definition would be improperly punished. *Id.* at 599-600. Either result would create non-uniformity due to the fact that the same conduct that would go unpunished in one state could be punished in another state due to the particular statutory language of the given states. *United States v. Epps*, 987 F.Supp. 22 (D.D.C.1997) (recognizing a division in the district courts as to whether felon-in-possession is a crime of violence and attributing the division to a feeling of being strictly constrained by the categorical approach). A number of courts have recognized and effectively applied the *Taylor* exception. *See generally, United States v. Winter*, 22 F.3d 15 (1st Cir.1994) (when statutory language blankets both

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enhancement. Entry of an automobile would not fit within the federally defined category of burglary and would not be the type of offense for which enhancement could be sought by the government. However, instead of determining that this particular state statute did not fit within the federally defined category of burglary, the Court ruled it appropriate to go beyond the statute and consider the actual conduct for which the conviction was obtained. Therefore, while all violations of a given statute may not constitute predicate offenses, if the statute's breadth overlaps into the categorical definition, the facts may be looked at to determine whether the alleged offense fits within the federal uniform category. *Taylor*, 495 U.S. at 602.

violent and non-violent crimes a court may go beyond the legislatures definition of the crime); *United States v. Harris*, 964 F.2d 1234 (1st Cir.1992) (looking at the statutory language alone will not be enough if the statute's language covers violent and non-violent crimes); *United States v. Fernandez*, 940 F.Supp. 387 (D.Mass.1996) (when a statute covers both violent and non-violent conduct, courts may look beyond the statute).

This Court concludes that, in the context of GMVA, a policy furthering federal uniformity can and should be applied. In fact, the reference in GMVA to section 16 indicates Congressional intent to set a uniform standard. All actions under GMVA must allege either a predicate crime or an offense that meets the requirements of section 16. That standard helps assure the uniform application of GMVA nationwide. Also, in order to effectuate the policy of uniformity, determination of whether a crime of violence has been alleged should be limited to analyzing the statutory language whenever possible. If the language of a statute encompasses only clearly violent crimes, then the statute can be used as the predicate crime.[5] However, if the statutory language embodies both violent and non-violent crimes, the conduct alleged must be analyzed to determine whether it would qualify as a "crime of violence" within the meaning of section 16.

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[5] In addition, the predicate crime would need to meet the other requirements of GMVA – i.e. constitute a felony against the person.

U.C.A. 76-5-404

In the present action, Plaintiffs have alleged a violation of U.C.A. § 76-5-404.[6] The statute is entitled "Forcible sexual abuse." If the label were to be regarded as persuasive, it is intuitive, as Plaintiffs have suggested, that any violation of the statute would constitute a violent crime. However, the technical definition or label of the predicate crime is not relevant to the determination of whether a given offense constitutes a "crime of violence." *Taylor*, 495 U.S. at 590-92; *U.S. v. Brunson*, 907 F.2d 117 (10th Cir.1990) (state law definition not applicable in defining "crime of violence").

In fact, the actual language of the statute encompasses a broad range of conduct, not all of which would constitute a "crime of violence" under section 16. While all of the conduct proscribed by the statute is unacceptable, not all of the conduct presents a "substantial risk that physical force against the person . . . may be used." 18 U.S.C.A. § 16. Although the State of Utah may define any intrusive or offensive touching as a "forcible sexual

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[6] U.C.A. § 76-5-404. Forcible sexual abuse.

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless o[f] the sex of any participant.

(2) Forcible sexual abuse is a felony of the second degree.

abuse" and thereby a seemingly violent crime, the federal standard of "crime of violence", pursuant to GMVA is not so broad. *Palazzolo*, 993 F.Supp. at 48-49 (unwelcome contact is deplorable and should be punished but its opprobrious nature does not convert it into a "crime of violence").

Plaintiffs have argued that, irrespective of the particular conduct in this case, any violation of U.C.A. section 76-5-404 is a "crime of violence." (Pls.' Mem. Opp. Mot. to Dis., at 2.) In support of this conclusion they rely on the Tenth Circuit's holding in *U.S. v. Reyes-Castro*, 13 F.3d 377 (10th Cir.1993) that sexual abuse of a child pursuant to U.C.A. § 76-5-404.1(1) (1990) is a crime of violence under 18 U.S.C. § 16(b). While the holding in *Reyes-Castro* may be influential, it does not control determination of the motion before the Court.

Plaintiffs have focused on language in *Reyes-Castro* that could be read to suggest that any non-consensual act upon another person constitutes a "crime of violence." *Reyes-Castro*, 13 F.3d at 379. Plaintiffs would have the Court read *Reyes-Castro* as expanding the categories of crimes of violence to all felonies involving a non-consensual act upon another person. It is not clear that the Tenth Circuit's holding was so broad. Furthermore, such a holding has been expressly rejected by at least one other circuit. *U.S. v. Shannon*, 110 F.3d 382, 385 (7th Cir.1997) ("An inference of violence from mere unconsented-to physical contact, . . . , would not wash in this circuit.").

Despite plaintiffs' broader urging, the court finds that the Tenth Circuit held in *Reyes-Castro* only that sexual abuse of a child is a crime of violence. Courts have consistently held that sexual crimes involving children as

victims meet the definition of "crimes of violence." *U.S. v. Shannon*, 110 F.3d 382 (7th Cir.1997) (sexual intercourse with a 13 year old girl resulting in her impregnation is a crime of violence within the meaning of the sentencing guidelines); *U.S. v. Bauer*, 990 F.2d 373 (8th Cir.1993) (statutory rape is a crime of violence); *U.S. v. Rodriguez*, 979 F.2d 138 (8th Cir.1992) (lascivious acts with minors is a "crime of violence"). In addition, and presumably for the purpose of analogy, the court concluded that "rape would be a crime of violence under 18 U.S.C. § 16(b)." *Reyes-Castro*, 13 F.3d at 379. The Tenth Circuit did not hold that the statute in question – U.C.A. § 76-5-404 – was a "crime of violence." Notably, the statute in question does not involve crimes against children nor does it necessarily involve physical impositions as grave in nature as those associated with rape.

Having made that significant distinction, this Court has been unable to find a single case finding that a predicate statute similar to the one at issue constitutes a per se "crime of violence." Furthermore, having reviewed over 100 cases that discuss the term "crime of violence" in a variety of contexts, the Court has not been able to identify a single case that involved conduct similar in nature to the conduct alleged in this case.

Plaintiffs have alleged the commission of numerous acts by defendant Rosquist on the Plaintiffs. Acts that fall within the purview of the alleged predicate crime include defendant Rosquist's touching of Plaintiffs' bodies – clothed and unclothed –, specifically breasts and buttocks, without their consent; and taking indecent liberties with Plaintiffs, including unzipping and removing plaintiff McCann's wet suit near the breast area, pulling out

the elastic waist band on plaintiff McCann's stretch pants to look down her pants, and rubbing his genital area against the Plaintiffs' bodies. (Compl.¶¶ 12-93.) While the conduct alleged is offensive and repulsive, and according to U.C.A. § 76-5-404, a felony, it is not of the violent nature required to state a cause of action under GMVA. The actions alleged do not constitute an offense that by its nature involved a substantial risk of the type of physical force required to state a cause of action under GMVA. Likewise, the time, place, manner, and other circumstances alleged are not such that the situation could escalate into one where there would be a substantial risk that physical force would be used. All of the acts alleged appear to have occurred at work or at social activities under circumstances that would have greatly discouraged any escalation of contact to the type of violent conduct required within the meaning of section 16(b) and GMVA.

Based on the foregoing, the Court finds that even upon accepting all of the facts alleged by Plaintiffs as true and construing them in a light most favorable to the Plaintiffs, they are insufficient to sustain a finding that Rosquist's conduct constituted a "crime of violence" within the meaning of title 42 section 13981. Consequently, Plaintiffs have failed to state a claim upon which relief can be granted.

Having found that Plaintiffs have failed to state a claim upon which relief can be granted, it is unnecessary for the Court to address Defendants' contention that Plaintiffs have failed to allege gender motivation as required by GMVA. Nevertheless, Defendants' attempt to characterize the alleged conduct as "amorous" as

opposed to being based on "animus" deserves comment. (Defs.' Mem. Supp. Mot. to Dis., at 6.) The notion that non-consensual sexually oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong. The legislative history makes clear that the "animus" required is something akin to a "gender bias." S.Rep. No. 103-138, at 52. In fact, the perception that a man is somehow less culpable in taking inappropriate liberties with members of the female gender if his motivations are amorous, seems to be just the type of "animus" that is a focus of concern in gender discrimination. Regardless of the amorous intentions of the perpetrator, non-consensual expressions of affection that rise to the nature of those alleged in this action are laden with disrespect for women. Were the court faced with resolution of this question in this matter, it would be disposed to find that plaintiffs have sufficiently alleged that the conduct of defendant Rosquist was motivated by gender within the meaning of GMVA.

Accordingly, Defendants' motion to dismiss is granted. Having dismissed the federal cause of action for failure to state a claim, the Court declines to exercise pendant jurisdiction over the remaining state causes of action.[7]

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[7] In *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) the Court held that: [n]eedless matter of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

The Court directs the clerk to enter judgment accordingly.

SO ORDERED.

Melanie McCANN, Noele Nelson, Lisa Nielson, Plaintiffs-Appellants,

v.

Bryon L. ROSQUIST, D.C., P.C., a Utah corporation; Bryon L. Rosquist, individually, Defendants-Appellees.

No. 98-4049.

United States Court of Appeals,
Tenth Circuit.

Aug. 3, 1999.

Larry S. Jenkins (Mary Anne Q. Wood, with him on the briefs), Wood Crapo LLC, Salt Lake City, Utah, for the Plaintiffs--Appellants.

Brent O. Hatch, Johnson & Hatch, P.C., Salt Lake City, Utah, for the Defendants-Appellees.

Before PORFILIO, LUCERO and COOK*, Circuit Judges.

LUCERO, Circuit Judge.

This case requires us to determine whether the Utah criminal offense of forcible sexual abuse, Utah Code Ann. § 76-5-404, constitutes a "crime of violence" within the meaning of 18 U.S.C. § 16. Because we conclude that the offense of forcible sexual abuse prohibited in the Utah statute implicates a significant risk of application of physical force, we reverse the district court's dismissal of plaintiffs' complaint for failure to state a cause of action

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* The Honorable H. Dale Cook, United States Senior District Judge for the Northern District of Oklahoma, sitting by designation.

under the Gender Motivated Violence Act (GMVA), the civil liability provision of the Violence Against Women Act (VAWA), 42 U.S.C. § 13981.

I

This appeal arises out of a civil action by plaintiffs-appellants Melanie McCann, Noele Nelson, and Lisa Nielson, against their former employer, chiropractor Bryon Rosquist. In their complaint, plaintiffs allege that during the course of their employment, Rosquist repeatedly fondled and rubbed their buttocks, breasts, and genital areas clothed and unclothed, without their consent and with the intent to gratify his sexual desire. The conduct occurred in the course of chiropractic examinations and ostensible adjustments that Rosquist allegedly required only of his female employees as a condition of their employment, as well as in other situations both in Rosquist's place of business and at workplace social events. In July 1997, after all plaintiffs had left or been terminated from Rosquist's employ, they filed suit in federal district court, alleging violation of the GMVA as well as state law claims for intentional infliction of emotional distress, assault, battery, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, wrongful termination in violation of public policy, and constructive termination.

Rosquist moved, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss plaintiffs' actions for failure to state a federal claim under the VAWA and for the ensuing lack of supplemental federal jurisdiction over state law claims. The district court dismissed plaintiffs' suit, reasoning that

although they had met the first element of the GMVA by alleging a felony against the person under Utah law, the felony alleged, forcible sexual abuse, is not a "crime of violence" under 18 U.S.C. § 16. *See McCann v. Bryon Rosquist, D.C., P.C.*, 998 F.Supp. 1246, 1248, 1252 (D.Utah 1998). The district court concluded that "[w]hile the conduct alleged is offensive and repulsive, and according to U.C.A. § 76-5-404, a felony, it is not of the violent nature required to state a cause of action under GMVA." *Id.* at 1252. Plaintiffs now appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and reverse.

II

The GMVA provides for a civil cause of action against any person "who commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c). "Crime of violence" is defined in relevant part as "an act or series of acts that would constitute a felony against the person . . . and that would come within the meaning of State or Federal offenses described in section 16 of Title 18." 42 U.S.C. § 13981(d)(2)(A).

Plaintiffs' complaint alleges a state law felony against the person, namely forcible sexual abuse, Utah Code Ann. § 76-5-404.[1] Cf. *Doe v. Hartz*, 134 F.3d 1339, 1343 (8th

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[1] Utah Code Ann. § 76-5-404(1) provides that [a] person commits forcible sexual abuse if the victin is 14 ears of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indicent liberties with another, or causes another to take indecent

Cir.1998) (dismissing suit under the GMVA for failure to allege a predicate felony under state or federal law). In addition, it is undisputed that Rosquist's alleged actions were motivated by gender. *See McCann*, 998 F.Supp. at 1252-53 (rejecting argument, apparently abandoned on appeal, that Rosquist's action was not motivated by gender because the alleged conduct was " 'amorous' as opposed to being based on 'animus' "). The dispositive question before us is whether the acts alleged come within the meaning of 18 U.S.C. § 16.

Section 16(a) defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Utah Code Ann. § 76-5-404 does not have such an element. *See State v. Kennedy*, 616 P.2d 594, 597-98 (Utah 1980) (stating, in discussion of analogous earlier version of forcible sexual abuse statute, that "[t]he law is clear in this state that outright violence is not a necessary element of a crime requiring lack of consent"). Plaintiffs maintain, rather, that 18 U.S.C. § 16(b), defining "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," includes the offense at issue in the instant action, and thus they state a claim under the GMVA.

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liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of the participant.

III

Our disposition of the case hinges upon our determination of whether the Utah offense of forcible sexual abuse fits within the definition of an offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 16(b). Our initial step in that determination is to ascertain the appropriate level of generality at which we assess "substantial risk." Specifically, we must determine whether we consider, for purposes of assessing substantial risk under § 16(b), only the offense as defined by state law, or whether we can take into account the particular conduct alleged.

A

We conclude that the language of 18 U.S.C. § 16 and our precedents require that the crime of violence analysis be conducted at the level of the statutory definition. *See United States v. Reyes-Castro,* 13 F.3d 377, 379 (10th Cir.1993) (holding that "a court must only look to the statutory definition, not the underlying circumstances of the crime" to determine whether a given offense is "by its nature a crime of violence" for purposes of 18 U.S.C. § 16) (citing *United States v. Rodriguez,* 979 F.2d 138, 141 (8th Cir.1992)). Applying what has been termed a "categorical approach" to defining offenses for crime of violence determinations, we concluded in *Reyes-Castro* that attempted sexual abuse of a child, in violation of Utah Code Ann. § 76-5-404.1(1), "by its nature" involves a "substantial risk" of physical force. *Reyes-Castro,* 13 F.3d at 379. Notably, the elements of that statute, Utah Code

Ann. § 76-5-404.1(1), are essentially identical to the elements of forcible sexual abuse, Utah Code Ann. § 76-5-404, differing only with respect to the age of the victim and the absence of an explicit lack-of-consent element, not to the behavior criminalized.[2]

The district court in this case, however, declined to apply the approach of *Reyes-Castro* to determine whether the Utah offense is, by its nature, a crime of violence under § 16. The court relied instead on *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), to find that forcible sexual abuse is an offense that falls within the so-called "*Taylor* exception." *See McCann*, 998 F.Supp. at 1250-51. Citing this exception, the district court based its analysis on the particular circumstances of the alleged acts in this case. *See id.* at 1252.

In *Taylor*, the Supreme Court considered whether a conviction under the Missouri burglary statute constituted "burglary" for purposes of the sentence enhancement

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[2] Utah Code Ann. § 76-5-404.1(1) provides that

> A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

for violent felonies, specifically including burglary, imposed by 18 U.S.C. § 924(e). The Court rejected the notion that "burglary" under 18 U.S.C. § 924(e)(2)(B)(ii) refers to any offense labeled "burglary" by the relevant State, and concluded instead that Congress intended to establish, for purposes of § 924(e)(2)(B)(ii), a uniform federal definition of burglary as a violent felony. *See Taylor,* 495 U.S. at 590, 110 S.Ct. 2143. Under this approach, the Court adopted a "generic" definition of burglary as unlawful entry into a building or structure for purposes of the violent felony sentence enhancement, and considered whether the defendant's conviction, under a burglary statute that did not utilize this "generic" definition, constituted a conviction for "burglary" within the meaning of § 924(e)(2)(B)(ii). *Id.* at 598-99, 110 S.Ct. 2143.

The Court in *Taylor* laid out a "categorical approach" for determining whether a state burglary statute satisfies the elements of federally-defined "generic burglary" for purposes of 18 U.S.C. § 924(e). *Id.* at 600, 110 S.Ct. 2143. Although normally this approach looks "only to the statutory definitions of the prior offenses, and not to the particular facts" underlying the convictions at issue, *id.*, nevertheless, the Court stated, "[t]his categorical approach . . . may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Id.* at 602, 110 S.Ct. 2143. The district court concluded that such an exception applied here, and thus went on to conclude that Rosquist's particular acts, in context, did not involve a substantial risk of physical force:

> The actions alleged do not constitute an offense that by its nature involved a substantial risk of the type of physical force required to state a cause of action under GMVA. Likewise, the time, place, manner, and other circumstances alleged are not such that the situation could escalate into one where there would be a substantial risk that physical force would be used. All of the acts alleged appear to have occurred at work or at social activities under circumstances that would have greatly discouraged any escalation of contact to the type of violent conduct required within the meaning of section 16(b) and GMVA.

McCann, 998 F.Supp. at 1252.

The "*Taylor* exception," however, is far narrower than the district court assumed, and does not envision the type of case-by-case inquiry that the district court applied. In *United States v. Permenter*, 969 F.2d 911, 913-14 (10th Cir.1992), we rejected the contention that the *Taylor* exception should extend beyond enumerated offenses to the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii), which provides for defining an offense as a qualifying crime of violence in general terms – as does U.S.C. § 16.[3] The "*Taylor* exception" is therefore restricted to cases in

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[3] 18 U.S.C. § 924(e)(2)(B) defines the term "violent felony," in relevant part, as a crime punishable by imprisonment for more than one year that:

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Reyes-Castro, 13 F.3d at 379 (quoting *Rodriguez*, 979 F.2d at 141). We therefore concluded, in light of both the terms of Utah child sexual abuse statute and "the legal determination that children are incapable of consent," there will always be "a substantial risk that physical force will be used to ensure the child's compliance." *Id.* We held that attempted sexual abuse of a child is a crime of violence under 18 U.S.C. § 16(b). *See id.*[7]

In *Reyes-Castro*, reference to the principle that a child is legally incapable of consent was persuasive but not dispositive.[8] More significantly, the statute now before us explicitly requires that the prohibited conduct be committed "without the consent of the other." Utah Code Ann. § 76-5-404. Therefore, the legal ability of adults to consent is irrelevant, as consent would remove conduct from the ambit of the statute. Although children's lesser physical stature and general vulnerability to violence and sexual

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[7] If attempted sexual abuse of a child is a crime of violence, a fortiori, the completed offense of sexual abuse of a child is a crime of violence. *Cf. United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244-45 (10th Cir.1998) (holding that sexual abuse of a minor is a violent crime within the meaning of the Sentencing Guidelines, and, noting that definitions of "crime of violence" in 18 U.S.C. § 16 and U.S.S.G. § 4B1.2 differ slightly, finding *Reyes-Castro* to be persuasive in its § 4B1.2 analysis); *United States v. Passi*, 62 F.3d 1278, 1282 (10th Cir.1995), (following *Reyes-Castro* in characterizing sexual abuse of a minor as a violent crime under U.S.S.G. § 2A3.1).

[8] Indeed, the analogy between the lack of consent element of § 76-5- 404 and the legal impossibility of consent implicated by § 76-5-404.1(1) renders the two statutes even less distinguishable and the *Reyes-Castro* analysis even more directly on point.

exploitation by adults may increase the risk that physical force be exerted to ensure compliance in situations of child sexual abuse, this presumption by no means forecloses the potential that the risk of such force against adults is nevertheless substantial within the meaning of 18 U.S.C. § 16.[9] In *Reyes-Castro,* we focused on the relationship between lack of consent and the substantial risk of the application of physical force. We conclude today that such relationship is significant regardless of the age of the victim. *Cf. United States v. Phelps,* 17 F.3d 1334, 1342 (10th Cir.1994) (concluding that kidnapping is a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii), and emphasizing relationship between lack of consent and risk of physical injury).

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[9] Rosquist suggests that to extend our reasoning in *Reyes-Castro* regarding sexual violence against children to sexual violence against women would be to engage in impermissible sex stereotyping. This argument ignores the fact that both the GMVA and the Utah forcible sexual abuse statute apply, respectively, to gender-motivated violence and sexual abuse against men as well. More to the point, it is a bizarre view of equality indeed to suggest that some abstract principle of sex equality requires legislatures and courts to ignore the degree to which sexual violence is overwhelmingly and specifically directed against women. *See,* e.g., Patricia Tjaden & Nancy Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 3, 12 (1998) (noting statistical predominance of partner violence and rape against women); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1303-06 (1991) (discussing uneasy relationship of sex equality doctrine to the reality of sexual assault against women).

Moreover, we note that the risk of physical force in a completed act or completed acts of forcible sexual abuse is arguably even greater than the risk at issue in *Reyes-Castro*, which involved attempted sexual abuse. *See Reyes-Castro*, 13 F.3d at 378.

We further reject the district court's assumption that either § 16 or the GMVA is restricted to a certain "type" of physical force. *See McCann*, 998 F.Supp. at 1252 ("The actions alleged do not constitute an offense that by its nature involved a substantial risk of the type of physical force required to state a cause of action under GMVA."). Section 16 refers only to "physical force"; it does not qualify that reference by requiring physical force of a particular nature or severity. In fact, the imposition of nonconsensual sexual contact, whether brought about by brute force or, as alleged here, by trick and abuse of authority, might itself be considered a form of violence, capable of causing mental and emotional injury no less severe than the physical injury caused by a blow. *See Passi*, 62 F.3d at 1282 (noting, in holding that sexual abuse is a crime of violence under the Sentencing Guidelines, district court's statement that "psychological brutalization is inherent in an offense like this and incest and rape are in the same category as both being crimes of violence inherently whether or not raw force is used"). Even if one were to reject such a theory, however, and conclude that "violence" requires some greater degree of physical coercion or injury, that risk thereof certainly exists. The very act of nonconsensual sexual contact, which by its nature evinces a clear intention to disregard the victim's dignity and bodily autonomy, both demonstrates and creates a

substantial risk of more serious physical intrusion or the application of force to ensure compliance.

Nor are we persuaded that Congress somehow imposed a more restrictive construction on the terms of 18 U.S.C. § 16 solely for purposes of the VAWA. The crimes of violence contemplated by the GMVA are more than merely murder, rape, and other extreme acts causing grave injury or death, but instead include, by incorporating the definition in 18 U.S.C. § 16, a variety of crimes both inherently forceful and implicating a significant risk of force. As the legislative history of the VAWA noted, the conduct covered by the GMVA includes "crimes of violence, including felony rape, sexual assault, kidnaping, *and any other felonies against the person* . . . committed because of or on the basis of gender, and motivated, at least in part, by animus toward the victim's gender." S.Rep. No. 103-138, at 64 (1993) (emphasis added). In enacting the VAWA, Congress recognized the degree to which our nation's systems of law enforcement and adjudication have been complicit in perpetuating the epidemic of violence against women, in part by failing to recognize crimes of gender-motivated violence as serious crimes. *See id.* at 49 ("Study after study have proved that crimes disproportionately affecting women are often treated less seriously than crimes affecting men."). We will not compound that failing today by restricting, in contravention of the language of 18 U.S.C. § 16, the definition of "violence" to only those forms of violence most traditionally feared by men – murder and serious bodily injury. To adopt such a restriction would be to exclude much of the "widespread incidence of physical assault against women" from the coverage of the VAWA.

Tjaden & Thoennes, Prevalence, Incidence, and Consequences of Violence Against Women at 12.

The civil remedy provision of the VAWA represents, in part, Congress's effort to remedy the ever-present threat of sexual assault and the continuing failure of our legal institutions to respond to that threat. In light of that effort, the plain language of 18 U.S.C. § 16, and the precedential authority of *Reyes-Castro*, we conclude that nonconsensual physical sexual abuse implicates substantial risk of physical force, even when unaccompanied by rape, bodily injury, or extreme forms of coercion. To do otherwise would be to perpetrate, deliberately and in contravention of established precedent, the very judicial indifference to gender-based violence that Congress has endeavored to obviate.

IV

We recognize that there has been considerable litigation over whether the civil remedy provision of the VAWA is a legitimate exercise of Congressional power under either the Commerce Clause of Article I or Section 5 of the Fourteenth Amendment. Compare, e.g., *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 889 (4th Cir.1999) (en banc), petitions for cert. filed, (U.S. June 25, 1999) (No. 99-5), (U.S. June 30, 1999) (No. 99-29) (holding that enactment of § 13981 exceeded Congressional authority under either the Commerce Clause or Section 5 of the Fourteenth Amendment) with *Ericson v. Syracuse University*, 45 F.Supp.2d 344, 348 (S.D.N.Y.1999) (holding § 13981 constitutional under the Commerce Clause).

Rosquist did not raise the constitutional issue below, however, and the district court did not rule on it. *See Rosquist*, 998 F.Supp. at 1247. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed on below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Although we may resolve issues for the first time on appeal if the facts of the individual case so warrant, *see id.* at 121, 96 S.Ct. 2868, we do so "only in the most unusual circumstances." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir.1993). We have, for example, considered an issue of law where the district court implicitly addressed it, *see Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1538 (10th Cir.1996), and where the proper resolution of the issue was beyond a reasonable doubt and failure to reach it would cause injustice, *see Petrini v. Howard*, 918 F.2d 1482, 1483 n. 4 (10th Cir.1990).

In this case, on the other hand, the district court explicitly refused to consider the issue, the issue itself is contentious, *see*, e.g., *Brzonkala*, 169 F.3d at 905 (Motz, J., dissenting), and neither the government nor appellants have been afforded an opportunity to develop arguments and present evidence in defense of the statute's constitutionality,[10] *see Singleton*, 428 U.S. at 120, 96 S.Ct. 2868 (chiding court of appeals for reaching merits of constitutional issue where one party had never been heard on

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[10] *See* Fed. R.App. P. 44 (requiring party challenging constitutionality of a federal statute, in an action in which the United States is not a party, to give written notice to the circuit clerk of the constitutional challenge in order to provide notice to the government). Our review of the docket in this case yields no indication that Rosquist has filed such Rule 44 notice.

which a court looks beyond the simple fact of a conviction to determine whether the offense meets the elements of certain specific offenses enumerated in § 924(e)(2)(B)(ii). *See Permenter*, 969 F.2d at 913. The exception does not apply to the "otherwise" clause of § 924(e)(2)(B)(ii), which defines "violent felony" as a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Likewise, it does not apply by analogy to 18 U.S.C. § 16, the statutory provision defining crimes of violence. Rather, § 16 is closely analogous to the "otherwise" clause of § 924(e)(2)(B)(ii), which defines a violent felony in general terms. Therefore, *Permenter* prohibits application of the "*Taylor* exception," or any equivalent exception to the categorical approach, when examining an offense to determine whether it qualifies as a "crime of violence" under 18 U.S.C. § 16.[4]

B

Section 16 also differs from the particular burglary provision of § 924(e) at issue in *Taylor*, in that our analysis under § 16 focuses on the terms of the particular state or federal statute at issue, rather than on constructing a

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[4] Moreover, even when applicable, the *Taylor* exception does not permit a subjective injury as to whether particular factual circumstances involve a risk of violence. *See Taylor*, 495 U.S. at 601, 110 S.Ct. 2143 (warning of "the practical difficulties and potential unfairness of a factual approach"). Rather, when applicable, it allows a court to look beyond the fact of conviction to determine whether the "definition [of a particular enumerated crime] is met by a specific conviction." *Permenter*, 969 F.2d at 914.

generic federal definition for every conceivable offense. *See Reyes-Castro*, 13 F.3d at 379 (citing *Taylor* and referring to its categorical approach as analogous supporting authority, rather than as directly controlling authority, for the approach to crime of violence analysis under § 16). The *Taylor* Court concluded that, in enumerating the specific offense of burglary in § 924(e)(2)(B)(ii), Congress intended to apply a uniform federal definition of burglary. *See Taylor*, 495 U.S. at 592, 110 S.Ct. 2143. Section 16, by contrast, does not refer to specific offenses, but rather provides a general definition for the category of crimes of violence. In addition, Congress has applied the § 16 definition, in a variety of contexts, to various state and federal offenses. *See*, e.g., 8 U.S.C. § 1101(a)(43) (defining aggravated felony, for immigration purposes, by reference to 18 U.S.C. § 16); 8 U.S.C. § 1227(a)(2)(E)(i) (defining domestic violence offenses, for deportation purposes, by reference to 18 U.S.C. § 16); 42 U.S.C. § 13891(d)(2)(A) (defining predicate offenses, for purposes of GMVA liability, by reference to 18 U.S.C. § 16).

Thus, § 16 does not demonstrate Congressional intent to require comparison with a particular uniform federally-defined offense, such as burglary. The Court's conclusion in *Taylor* that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," 495 U.S. at 598, 110 S.Ct. 2143, does not extend to the broader proposition that Congress intended uniform federal definitions for all offenses – none specifically enumerated – in conducting crime of violence analyses under 18 U.S.C. § 16. To import such a requirement would impose on federal courts the overwhelming and ultimately pointless task of creating

generic federal definitions for all crimes, even those lacking any clear common-law origin or general consensus on their elements. *Cf. Taylor*, 495 U.S. at 592-94, 110 S.Ct. 2143 (discussing common-law origin and shared core definition of burglary). Therefore, under *Reyes-Castro*, we focus only on the elements of a particular state statute in applying § 16, and do not attempt to construct a uniform federal definition for the offense at issue. *See Reyes-Castro*, 13 F.3d at 379.

C

Having determined our approach to § 16(b) and the GMVA, the question before us is whether forcible sexual abuse, as defined under Utah law, carries a similarly substantial risk of physical force as does attempted sexual abuse of a child, the crime of violence at issue in *Reyes-Castro*.[5] Forcible sexual abuse, as defined in Utah Code Ann. § 76-5-404 as intentional sexual touching of another with a particular mental state and without consent, represents a particular subset of assault and battery.[6] *See State*

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[5] We look to the elements of the statute, not just the fact that it is labeled "forcible," in conducting our analysis under 18 U.S.C. § 16(b). *See Reyes-Castro*, 13 F.3d at 379 (examining elements of statutory definition of crime).

[6] Although the Utah statute also provides that a person commits forcible sexual abuse if that person "otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another," Utah courts have read this language narrowly, holding that "indecent liberties" refers only to "acts of equal magnitude of gravity" to those specifically set forth in the statute. *Kennedy*, 616 P.2d at 597; *see also State in the Interest of J.L.S.*, 610 P.2d 1294, 1296 (Utah 1980)

v. Jones, 878 P.2d 1175, 1177 (Utah Ct.App.1994) (concluding that assault, "an act committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another," Utah Code Ann. § 76-5-102, may be a lesser included offense of forcible sexual abuse); *cf. Palazzolo v. Ruggiano*, 993 F.Supp. 45, 47-49 (D.R.I.1998) (dismissing, for failure to state a predicate crime of violence for purposes of the GMVA, a suit alleging violation of R.I. Gen. Laws § 11-37-4(3), a statutory provision that does not require as an element either use of force or lack of consent).

In *Reyes-Castro*, analyzing the analogous statutory counterpart – covering sexual abuse of a child – to the statute before us – covering sexual abuse of an adult – we focused on the nonconsensual character of the offense of sexual abuse of a child. *See Reyes-Castro*, 13 F.3d at 379. Noting that rape is a violent crime, *see id.* (citing *State v. Cude*, 784 P.2d 1197, 1203 n. 27 (Utah 1989)), we addressed the relationship between lack of consent, an element of the crime of rape, and the risk of physical force, and stated that

> [b]ecause the crime [of rape] involves a nonconsensual act upon another person, there is a substantial risk that physical force may be used in the course of committing the offense. It does not matter whether physical force is actually used. "Our scrutiny ends on a finding that the risk of violence is present."

(reading the term "indecent liberties" as not "subsuming a mere offensive touching when the circumstances do not indicate conduct of sufficient gravity to be equated with the specific descriptions [of offensive touching] set forth in the statute.")

that issue). We therefore refuse to consider the constitutionality of the GMVA at this time.[11]

Nor are we persuaded that the possibility of constitutional challenges to the GMVA requires a narrow interpretation of the term "crime of violence" in 18 U.S.C. § 16, under the rule of statutory construction requiring that we construe a statute "to avoid difficult constitutional issues" in the absence of clear legislative intent. *Turner v. United States Parole Comm'n*, 934 F.2d 254, 257 (10th Cir.1991). Section 16 exists independently of the VAWA, and we cannot disregard Congress's clear legislative intent to incorporate its definition of crimes of violence into the GMVA. It is simply not permissible for us to create, contrary to clear legislative intent, a special narrower construction of 18 U.S.C. § 16 for purposes only of the GMVA, in an effort to avoid a hypothetical constitutional challenge. Moreover, the relationship between the GMVA's incorporation of the definition of crimes of violence and Congress's authority to enact the GMVA under the Commerce Clause and the Fourteenth Amendment is exceptionally attenuated. Thus we are neither persuaded that constitutional concerns require insertion of a narrowing construction into the GMVA's incorporation of 18 U.S.C. § 16, nor that such concerns are sufficiently intertwined with the issue of the construction of the GMVA and § 16 to require resolution today.

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[11] Rosquist's suggestion that the constitutionality of the GMVA is jurisidictional and therefore a predicate issue is without merit. The provisions of the VAWA are presumed constitutional until invalidated, and therefore if plaintiffs' complaint states a claim under the GMVA, it clearly invokes federal question jurisdiction.

V

We conclude that the offense of nonconsensual sexual abuse of an adult necessarily implicates a significant risk of physical force being used to ensure compliance with the perpetrator's desires. Therefore, Utah Code Ann. § 76-5-404 is indistinguishable, for purposes of a "crime of violence" analysis under 18 U.S.C. § 16, from Utah Code Ann. § 76-5-404.1(1), and *Reyes-Castro* dictates that plaintiff's allegations state a cause of action under 42 U.S.C. § 13891. The district court's dismissal of plaintiffs' complaint for failure to state a claim is REVERSED, as is the district court's decision to decline pendent jurisdiction over plaintiffs' state law claims, and the matter is remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MELANIE MCCANN, NOELE NELSON, LISA NIELSON,	)	
Plaintiffs-Appellants,	)	
v.	)	
BRYON L. ROSQUIST, D.C., P.C., a Utah corporation; BRYON L. ROSQUIST, individually,	)	No. 98-4049
Defendants-Appellees.	)	

ORDER

Filed October 4, 1999

Before **PORFILIO, LUCERO** and **COOK***, Circuit Judges.

Appellee's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active

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*The Honorable H. Dale Cook, United States Senior District Judge for the Northern District of Oklahoma, sitting by designation.

service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Illegible
Deputy Clerk

(f) the accused committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct;

(g) the accused committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense;

(h) the offense was committed by a person who occupied a position of special trust in relation to the victim; "position of special trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, baby-sitter, adult scout leader, natural parent, stepparent, adoptive parent, legal guardian, grandparent, aunt, uncle, or adult cohabitant of a parent;

(i) the accused encouraged, aided, allowed, or benefited from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person; or

(j) the accused caused the penetration, however slight, of the genital or anal opening of the child by any part or parts of the human body other than the genitals or mouth.

(4) Aggravated sexual abuse of a child is a first degree felony punishable by imprisonment for an indeterminate term of not less than five years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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42 U.S.C. § 13981. Civil rights

(a) Purpose

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

UTAH CODE, 1953
TITLE 76. UTAH CRIMINAL CODE
CHAPTER 5. OFFENSES AGAINST THE PERSON
PART 4. SEXUAL OFFENSES

76-5-404 Forcible sexual abuse.

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

(2) Forcible sexual abuse is a felony of the second degree.

76-5-404.1 Sexual abuse of a child – Aggravated sexual abuse of a child.

(1) A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to

any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(2) Sexual abuse of a child is punishable as a second degree felony.

(3) A person commits aggravated sexual abuse of a child when in conjunction with the offense described in Subsection (1) any of the following circumstances have been charged and admitted or found true in the action for the offense:

(a) the offense was committed by the use of a dangerous weapon as defined in Section 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnaping;

(b) the accused caused bodily injury or severe psychological injury to the victim during or as a result of the offense;

(c) the accused was a stranger to the victim or made friends with the victim for the purpose of committing the offense;

(d) the accused used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense;

(e) the accused, prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense;

(b) Right to be free from crimes of violence

All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

(c) Cause of action

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) Definitions

For purposes of this section –

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means –

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have

actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) Limitation and procedures

(1) Limitation

Nothing in this section entitles a person to a cause of action under subsection (c) of this section for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d) of this section).

(2) No prior criminal action

Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section.

(3) Concurrent jurisdiction

The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this part.

(4) Supplemental jurisdiction

Neither section 1367 of Title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

(5) Omitted